

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DIANA K. WALKER,)	
)	
Claimant,)	
)	
v.)	IC 2004-515150
)	
CLEAR SPRINGS FOOD COMPANY,)	
)	
Employer,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
and)	AND RECOMMENDATION
)	
LIBERTY NORTHWEST INSURANCE)	Filed October 25, 2007
CORPORATION,)	
)	
Surety,)	
Defendants.)	
)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Twin Falls, Idaho, on January 25, 2007. L. Clyel Berry of Twin Falls represented Claimant. E. Scott Harmon of Boise represented Defendants. Oral and documentary evidence was presented at the hearing. The record remained open for the taking of two post-hearing depositions. The parties submitted post-hearing briefs and this matter came under advisement on August 10, 2007, and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant suffered a personal injury arising out of and in the course of employment;
2. Whether Claimant's injury was the result of an accident arising out of and in the course of employment;
3. Whether Claimant's condition is due in whole or in part to a pre-existing injury or disease or cause not work-related;
4. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof;
5. Whether Claimant is entitled to temporary partial and/or temporary total disability (TPD/TTD) benefits, and the extent thereof;
6. Whether Claimant is entitled to permanent partial impairment (PPI), and the extent thereof;
7. Whether Claimant is entitled to permanent partial or permanent total disability (PPD/PTD) in excess of permanent impairment, and the extent thereof;
8. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate;
9. Whether Claimant's condition is due in whole or in part to a subsequent injury or disease not work-related; and
10. Whether Claimant is entitled to attorney fees due to Employer/Surety's unreasonable denial of compensation as provided for by Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

The parties agree that the threshold issue to be resolved is causation. Claimant asserts that she sustained a low back injury as the result of an industrial accident of May 25, 2004,

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2

which has resulted in the need for three lumbar surgeries. Specifically, Claimant contends that she slipped on an icy floor and fell against a wall in such a manner that a large disc herniation resulted at L4-5. Claimant seeks medical benefits for the treatment of her lumbar injury; intermittent lost time benefits from July 4, 2004 through May 24, 2006; a PPI rating of 25%; a finding of disability in excess of impairment in the amount of at least 65%; and an award of attorney's fees.

Defendants acknowledge the existence of a work related accident and injury, but dispute that the injury extends beyond a transient lumbar strain/sprain. Defendants assert that Claimant's large disc herniation is inconsistent with both the reported mechanism of injury and Claimant's presentation during the weeks immediately following the injury. Defendants contend that the remaining issues regarding entitlement to benefits are moot in light of the fact that Claimant has not met her burden of proof to causally relate the disc herniation to her injury.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the hearing;
2. Claimant's Exhibits 1-20a;
3. Defendants' Exhibits A through O, Q and R;
4. The post-hearing deposition of David Verst, M.D., taken by Claimant on February 12, 2007; and
5. The post-hearing deposition of Richard Silver, M.D., taken by Defendants on April 3, 2007, with the exception of testimony by Dr. Silver regarding any causative event

occurring in late June or early July of 2004, as described in the Order Granting Motion to Exclude signed on May 24, 2007.

All objections made during the course of taking the above referenced depositions beyond those addressed in the Order Granting Motion to Exclude signed on May 24, 2007, are overruled. Claimant's objection to pages 175 through 208 of Exhibit O is overruled.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 40 years of age and resided in Filer, Idaho, at the time of the hearing. Claimant graduated from high school in 1984. She has worked in various capacities for Employer over the past 17 years. Previous employment consisted primarily of cashier work in the concession, retail and grocery industries. Employer's business involves the processing and packaging of fish. Claimant has performed duties associated with sanitation, packaging, sorting and quality assurance. Positions held by Claimant with Employer require intermittent lifting of at least 30 pounds.

2. On May 25, 2004, Claimant was working as a quality assurance technician for Employer when she slipped on slushy ice on the floor in the hallway of a cooler. Claimant fell forward into a wall and did not fall to the floor. Claimant's hands and chest struck the wall and Claimant turned her head to avoid her face striking the wall. Claimant felt a "tug" and "a little bit weird."

3. Claimant had multiple prior injuries with Employer of which she has little recollection. Previous work injuries include broken ribs, soft tissue injuries to the upper extremities and mid-back pain due to lifting a tub of fish. Additionally, Claimant received

intermittent chiropractic treatment prior to the injury of May 25, 2004, which was not associated with specific injuries. Claimant was not diagnosed with lumbar radicular symptoms and/or a significant back injury prior to the current injury.

4. Claimant mentioned her injury, on the day it occurred, to a co-worker, Kathy Deitrick. Claimant warned Ms. Deitrick about the ice on the floor and explained what had happened. Ms. Deitrick was not aware of Claimant having previous back problems, but noticed a progressive worsening of Claimant's condition following the injury.

5. Claimant did not formally report the injury to Employer until June 23, 2004. Claimant's explanation for her delay in reporting the injury was that she had a previously scheduled vacation and wanted to wait and see if her condition improved. Claimant's vacation was for one week and began on June 3, 2004. The vacation involved traveling by car to California for a relative's wedding.

6. Claimant experienced increased symptoms during the nine hour car trip to California. On the return trip, Claimant stopped at her husband's uncle's home in Fallon, Nevada, and went to see a chiropractor at the uncle's urging. A patient questionnaire from Fallon Chiropractic Center dated June 8, 2004, notes lower back symptoms that worsened on June 1st without recent trauma. Claimant received an adjustment at the clinic in Fallon which she indicated neither helped nor worsened her condition.

7. The next day, Claimant sought treatment with Justin R. Cleverley, D.C., with whom Claimant had previously treated. Chart notes from June 9, 2004, indicate that Claimant had lumbar spine pain which had been made worse during the drive to California. Dr. Cleverley's notes from June 9, 2004, do not reference a work-related injury. Claimant

asserted that treatment from Dr. Cleverley on June 9, 2004, neither helped nor worsened her condition.

8. Dr. Cleverley subsequently reviewed his records and provided a report with a questionnaire addressing causation of Claimant's symptoms. He confirmed that Claimant was treated on nine occasions for lumbar spine pain from May 5, 2003, through April 26, 2005, during which time there were no complaints of leg symptoms or other indications that Claimant had a disc herniation. Claimant's previous symptoms were right sided and resolved with a short period of treatment. Dr. Cleverley represented that Claimant "felt fine" in April of 2004 and opined that, but for the occurrence of trauma, an accident or an untoward event occurring after April 26, 2004, he would not have anticipated that Claimant would present with symptoms associated with a large, left sided, disc herniation.

9. On June 11, 2004, Claimant sought treatment from Geoffroi Golay, D.C., with whom she had previously treated. Onset of symptoms was noted as occurring on June 1, 2004, with "overuse" and driving to California. Dr. Golay's records do not describe a work-related injury. Claimant asserted that Dr. Golay's treatment of June 11, 2004, neither helped nor worsened her condition.

10. Dr. Golay completed a questionnaire in which he indicated that Claimant's presentment prior to May 25, 2004, did not indicate the existence of a serious or significant condition to the lower back. He opined that, but for the occurrence of trauma, an accident or an untoward event occurring following his last evaluation of Claimant prior to May 25, 2004, he would not have reasonably anticipated that Claimant would present in early July of 2004 with radiculopathy and paresthesias into the left lower extremity and/or with MRI findings of a left sided L4-5 disc herniation.

11. On July 3, 2004, Claimant sought treatment with her primary care physician, Daniel Preucil, M.D., for left-sided low back pain with left sided radicular symptoms. Dr. Preucil was the first medical service provider to document a history consistent with a work-related injury of May 25, 2004. He also documented the increase in symptoms as the result of prolonged sitting during a trip. He noted that the chiropractic visits helped with acute pain, but did not eliminate it. Claimant was given prescriptions for medication and work restrictions.

12. Claimant sought treatment at an emergency room on July 4, 2004, where she was evaluated by Kevin Kraal, M.D. Dr. Kraal documented a work related low back injury with progressive worsening of Claimant's condition. Claimant's medications were changed and recommendations made for bedrest and an MRI. Claimant indicated that she went to the emergency room because the medication prescribed by Dr. Preucil made her nauseous.

13. Claimant followed up on July 6, 2004, with Douglass Stagg, M.D. Dr. Stagg reported a history of injury as the result of a slip and twisting of the low back in order to prevent a fall. He documented the progressive nature of symptoms and the uncomfortable car trip to California. Radicular pain was noted to be present July 3rd with a worsening of symptoms on July 4th after dry heaves associated with vomiting. Claimant was taken off of work and an MRI study of the lumbar spine was recommended. Claimant was re-evaluated on July 8, 12, and 13, 2004. Claimant was referred to David R. Long, D.C., for neck pain¹ and to David B. Verst, M.D., for treatment of the lumbar spine upon review of MRI findings consistent with a disc herniation.

14. Dr. Verst initially evaluated Claimant on July 14, 2004. He noted a history of slipping on an icy floor at work on May 25, 2004, and described a progressive onset of

¹ Claimant does not contend that neck pain or problems are associated with the injury of May 25, 2004.

symptoms. Dr. Verst recommended surgical intervention based on MRI findings of a large disc rupture at L4-5 that occupied 85% of the spinal canal. Dr. Verst performed an endoscopic micro lumbar discectomy on July 20, 2004. A repeat discectomy was performed on December 7, 2004, to alleviate nerve compression associated with a recurrent fragment. Dr. Verst performed a third surgery on August 30, 2005, in the form of an anterior lumbar interbody fusion in order to address left leg irritation and chronic back pain.

15. Claimant was evaluated by Richard Silver, M.D., on July 12, 2005, at the request of Defendants. Dr. Silver reviewed medical records, obtained a detailed history from Claimant and performed a physical evaluation. Dr. Silver concluded that Claimant's work injury of May 25, 2004, consisted of a minor lumbar strain that would have resolved within a couple of days. Dr. Silver opined that if Claimant would have sustained such a severe herniation at the time of her injury, she would have been immediately symptomatic and unable to complete her workday and/or rest of the work week. Dr. Silver concluded that Claimant's onset of problems on June 1, 2004, was not related to the injury of May 25, 2004. Rather, Dr. Silver indicated that Claimant's problems were related to a natural progression of chronic discogenic disc disease or chiropractic adjustments on a repetitive basis. He indicated that Claimant would not have physical restrictions, limitations, or permanent impairment as a result of the work injury.

16. Dr. Verst disagrees with the opinions of Dr. Silver. Dr. Verst concludes that the progressive onset of symptoms is consistent with the mechanism of injury and explained that there would not necessarily have been an immediate onset of severe pain. He explained that there was likely a disruption of the outer ring of the disc at the time of injury, but that the expulsion of the nucleus was progressive. Dr. Verst disagrees that a more likely cause for the disc herniation would be chiropractic adjustments, chronic discogenic disease, or coughing.

17. Dr. Verst initially determined that Claimant reached maximum medical improvement (MMI) in June of 2005 and that her PPI was 12% of the whole person based on the American Medical Association's Guides to the Evaluation of Permanent Impairment. Following the third surgery, Dr. Verst indicated that MMI had been reached in May of 2006 and that Claimant had 25% whole person PPI pursuant to the 5th Edition of the Guides and that Claimant fell into diagnosis related (DRE) category III. He subsequently noted that there had been a dictation error and that Claimant's 25% whole person PPI was consistent with DRE lumbar category IV.

18. Dr. Verst has provided permanent physical restrictions to Claimant that include limitations with bending, stooping, kneeling, squatting, crawling, and stair climbing. He has restricted Claimant's lifting to 20-30 pounds on an occasional basis. He feels that Claimant is able to work six to eight hours per day with the option to alternate sitting and standing, as needed. Claimant's restrictions preclude walking more than a half of a mile at a time and performing activities that require torquing of the torso.

19. Claimant returned to work for Employer in her pre-injury job, with accommodations regarding hours worked per week and assistance from co-workers with lifting on an as needed basis. Claimant averaged between 44 and 45 hours per week at the time of injury and was working approximately 35 hours per week at the time of the hearing. Claimant's hourly rate has increased since the time of injury. Claimant continues to have health insurance coverage through Employer.

20. Claimant's activities outside of work have been impacted by the injury. Her recreational activities such as camping, snowmobiling and four-wheeling have been limited.

Claimant's husband has been supportive but she feels that they are growing apart on certain issues. Sexual activity is painful for Claimant.

21. Douglas Crum, C.D.M.S., is a vocational rehabilitation consultant hired by Claimant. Mr. Crum confirms that Claimant has returned to work as a quality assurance technician for Employer and that her hourly wage has increased from \$10.24 to \$11.37 since the injury, but that Claimant has experienced a 21.8% decrease in hours worked due to the injury. Accordingly, Claimant is earning 12.7% less than she did at the time of injury. Mr. Crum opines that Claimant's loss of access to the labor market is approximately 75% and that Claimant's PPI would be 35% if she continues work for Employer with an increase of PPD to 65% if Claimant were to find herself looking for work in the competitive labor market.

DISCUSSION AND FURTHER FINDINGS

Causation

22. Claimant has the burden of proof to establish, by medical probability, all elements necessary to show that the injuries complained of arose from an accident occurring in the course of employment. Hart v. Kaman Bearing & Supply, 130 Idaho 269, 939 P.2d 1375 (1997). Medical probability requires a showing of "more evidence for than against." Soto v. Simplot, 126 Idaho 536, 540, 887 P. 2d 1043, 1047 (1994). Although it is incumbent on a claimant to establish the right to compensation by a preponderance of the evidence, it is not necessary that the cause of the injury relied on be proven to the exclusion of other possible causes. Suren v. Sunshine Mining Company, 70 P. 2d 399, 403 (Idaho 1937).

23. Dr. Silver suggested alternate causes for Claimant's disc herniation and challenged the existence of a causal relationship with the industrial injury based on the lack of sudden onset of severe symptoms. However, Dr. Verst addressed alternate causes and concluded

that Claimant's industrial accident was the most likely cause of Claimant's condition. Multiple other physicians documented the work-related mechanism of injury without questioning the cause of Claimant's lumbar problems. Claimant has met her burden of proof to establish a causal connection between her injury and lumbar disc herniation.

24. Claimant's condition did not result from pre-existing and/or subsequent injury or disease or cause not work related. Claimant experienced intermittent back pain prior to her injury and experienced a worsening of symptoms subsequent to her injury as the result of the car trip to California. Neither the pre-existing back pain nor the car trip caused Claimant's disc herniation at L4-5. Similarly, Claimant's condition was not caused by merely a natural progression of degenerative changes or the result of chiropractic treatment.

Temporary Disability Benefits

25. Claimant met her burden of proof to establish temporary disability from July 4, 2004 through May 24, 2006, at which time Claimant reached maximum medical improvement for her injury. Claimant has established entitlement to TTD benefits for three separate periods of time that correspond with surgical treatment and post-operative recovery. Following each period of TTD entitlement, Claimant established periods of entitlement to TPD benefits.

Permanent Partial Impairment Benefits

26. Dr. Verst is the only physician to provide a PPI rating for Claimant's disc injury and related surgeries. (See preceding paragraph 17). Dr. Verst attempted to clarify the assignment of a 25% whole person rating by stating that it was consistent with the Guides and DRE lumbar category IV impairment. However, the 5th Edition of the Guides provides a range of 20% to 23% for DRE lumbar category IV impairment. Further, the assignment of DRE

lumbar category IV impairment requires demonstration of loss of motion segment integrity as described by precise measurements which include angular motion greater than 20° at L4-5. Dr. Verst documented angular motion of 15°. The 25% whole person PPI rating is not supported by either the 5th Edition of the Guides or the medical evidence.

27. The medical evidence establishes that Claimant's condition is most consistent with DRE lumbar category III impairment which allows a range of 10% to 13% whole person PPI. This category of impairment reflects diagnoses of a post-surgically treated lumbar disc injury with chronic pain and radiculopathy. Additional impairment is not assigned for multiple surgeries. The range allows for variance regarding the resolution or continuance of symptoms. Medical evidence supports a whole person PPI rating of 13%.

Disability in Excess of Impairment

28. Factors to be considered when calculating a percentage of permanent disability include the nature of the physical disablement, disfigurement, cumulative effect of multiple injuries, claimant's age and ability of the claimant to compete in an open labor market within a reasonable geographical area. Idaho Code § 72-430. The degree of permanent disability resulting from an industrial injury is a question of fact to be resolved by the Commission. Zapata v. J.R. Simplot Co., 132 Idaho 513, 516, 975 P.2d 1178, 1181 (1999). A claimant's return to his or her pre-injury occupation may support a determination that there is no disability in excess of impairment. Rivas v. K.C. Logging, 134 Idaho 603, 7 P. 3d 212 (2000).

29. In the present case, Claimant demonstrated an ability to return to her pre-injury occupation, but experienced a decrease in earnings due to a reduction of hours worked because of disablement associated with the injury. Claimant has been pro-active regarding return to work and Employer has been accommodating of Claimant's restrictions. An assignment of permanent

disability should not appear to punish the positive efforts made by both Claimant and Employer which have facilitated a successful return to work. However, Claimant experienced a measurable loss of income and will face obstacles obtaining employment in the open labor market should her service with Employer terminate for any reason. Claimant's vocational expert suggested a "middle ground" rating of 50%. This rating is supported by the evidence.

Attorney's Fees

30. Claimant seeks an award of attorney's fees pursuant to Idaho Code § 72-804 and asserts that Defendants acted unreasonably by retaining and relying on the opinion of Dr. Silver. Attorney's fees are not granted to a claimant as a matter of right under workers' compensation law and may only be affirmatively awarded under circumstances set out in Idaho Code § 72-804 which describes the denial or delay of payment of benefits without a reasonable basis. Wutherich v. Terteling Co., 135 Idaho 593, 21 P.3d 915 (2001). The question of whether grounds exist for awarding a claimant attorney's fees is a question of fact for the Commission. Id.

31. Although the opinions of Dr. Silver failed to carry the day, Defendants' reliance upon Dr. Silver was not unreasonable and does not support an award of attorney's fees. Dr. Silver considered the fact that Claimant failed to report a work-related mechanism of injury to the chiropractors with whom treatment was initially sought. The fact that initial records mention the car trip to California but fail to mention a work injury is supportive of Defendants' denial of benefits.

CONCLUSIONS OF LAW

1. Claimant suffered a personal injury arising out of and in the course of employment.

2. Claimant's injury was the result of an accident on May 25, 2004, arising out of and in the course of employment.

3. Claimant's condition is not due in whole or in part to a pre-existing or subsequent injury or disease or cause not work-related.

4. Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432 for her lumbar injury of May 25, 2004.

5. Claimant is entitled to TTD benefits from July 4, 2004 through September 20, 2004; December 7, 2004 through January 19, 2005; and August 30, 2005 through October 23, 2005. Claimant is entitled to TPD benefits from September 21, 2004 through December 6, 2004; January 20, 2005 through August 29, 2005 and October 24, 2005 through May 24, 2006.

6. Claimant is entitled to whole person PPI benefits of 13%.

7. Claimant is entitled to PPD inclusive of permanent impairment of 50% of the whole person.

8. Apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is not appropriate.

9. Claimant is not entitled to an award of attorney's fees.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this __12th__ day of _October_ 2007.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _25th__ day of _October_ a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

L CLYEL BERRY
P O BOX 302
TWIN FALLS ID 83303-0302

SCOTT HARMON
PO BOX 6358
BOISE ID 83707

ge

_____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DIANA K. WALKER,)	
)	
Claimant,)	IC 2004-515150
)	
v.)	
)	ORDER
CLEAR SPRINGS FOOD COMPANY,)	
)	Filed October 25, 2007
Employer,)	
)	
and)	
)	
LIBERTY NORTHWEST INSURANCE)	
CORPORATION,)	
)	
Surety,)	
)	
Defendants.)	
)	

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant suffered a personal injury arising out of and in the course of employment.
2. Claimant's injury was the result of an accident on May 25, 2004, arising out of and in the course of employment.

3. Claimant's condition is not due in whole or in part to a pre-existing or subsequent injury or disease or cause not work-related.

4. Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432 for her lumbar injury of May 25, 2004.

5. Claimant is entitled to total temporary disability benefits from July 4, 2004 through September 20, 2004; December 7, 2004 through January 19, 2005; and August 30, 2005 through October 23, 2005. Claimant is entitled to temporary partial disability benefits from September 21, 2004 through December 6, 2004; January 20, 2005 through August 29, 2005 and October 24, 2005 through May 24, 2006.

6. Claimant is entitled to whole person permanent partial impairment benefits of 13%.

7. Claimant is entitled to permanent partial disability inclusive of permanent impairment of 50% of the whole person.

8. Apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is not appropriate.

9. Claimant is not entitled to an award of attorney's fees.

10. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this __25th__ day of __October__, 2007.

INDUSTRIAL COMMISSION

____/s/_____
James F. Kile, Chairman

____/s/_____
R.D. Maynard, Commissioner

PARTICIPATED BUT DID NOT SIGN.
Thomas E. Limbaugh, Commissioner

ATTEST:

____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __25th__ day of __October__, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

L CLYEL BERRY
PO BOX 302
TWIN FALLS ID 83303-0302

SCOTT HARMON
PO BOX 6358
BOISE ID 83707

ge

____/s/_____